

112 FERC ¶ 61,023
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

PSEG Lawrenceburg Energy Company LLC Docket Nos. ER01-2460-002
ER01-2460-003

PSEG Waterford Energy LLC ER01-2482-002
ER01-2482-003

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS
SUBJECT TO FILING A REVISED GENERATION MARKET UPDATE

(Issued July 5, 2005)

1. In this order we accept an updated market power analysis filed by PSEG Lawrenceburg Energy Company (PSEG Lawrenceburg) and PSEG Waterford Energy LLC (PSEG Waterford) (collectively the “Applicants”), and direct the Applicants to file a revised generation market power update following consummation of the merger with Exelon Corporation (Exelon). We also accept Applicants’ tariff sheets incorporating the Commission’s market behavior rules.¹ As discussed below, we conclude that, with the tariff modifications directed herein, the Applicants satisfy the Commission’s standards for market-based rate authority. This order benefits customers by reviewing the conditions under which market-based rate authority is granted, thus ensuring that the prices charged for jurisdictional sales are just and reasonable. The Applicants’ next updated market power analysis is due the earlier of three years from the date of this order or 30 days after the date of consummation of the merger with Exelon.²

¹ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh’g*, 107 FERC ¶ 61,175 (2004).

² On February 4, 2005, Exelon Corporation filed a request for Commission authorization to merge with Public Service Enterprise Group, Inc. (PSEG) under section 203 of the Federal Power Act, 16 U.S.C. § 824b (2000), in Docket No. EC05-43-000. A Commission order approving that merger was issued July 1, 2005, *Exelon Corporation*, 112 FERC ¶ 61,011 (2005).

Background

2. On August 30, 2004, the Applicants filed an updated market power analysis. On October 1, 2004, AEP joined the PJM Interconnection, LLC (PJM), and at that time the Applicants' facilities became a part of PJM, a region in which the Applicants' affiliates own transmission and generation facilities. On November 16, 2004, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a deficiency letter seeking additional information related to the Applicants' updated market power analysis filed August 30, 2004. By motion dated November 19, 2004, the Applicants sought and received an extension to February 7, 2005 to comply with the Commission's deficiency letter.
3. On February 7, 2005, as amended on February 15, 2005, the Applicants submitted for filing a response to the deficiency letter, including an updated market power analysis for the PJM market. On February 7, 2005, the Applicants also submitted a compliance filing to amend their market-based rate tariff sheets to include the market behavior rules.
4. PSEG Lawrenceburg owns and operates a 1234 MW generating plant in Dearborn County, Indiana. PSEG Waterford owns and operates a 914 MW generating plant in Washington County, Ohio. The Applicants are wholly-owned indirect subsidiaries of PSEG.

Notice and Responsive Pleadings

5. Notice of the Applicants' August 30, 2004 filing was published in the *Federal Register*, 69 Fed. Reg. 54,664 (2004), with protests and interventions due on or before September 20, 2004. None was filed.
6. Notice of the Applicants' February 7, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 8,357 (2005), with protests and interventions due on or before February 28, 2005. None was filed.
7. Notice of the Applicants' February 15, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 11,965 (2005), with protests and interventions due on or before March 9, 2005. None was filed.

Discussion

Market-Based Rate Authorization

8. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers

whether there is evidence of affiliate abuse or reciprocal dealing.³ As discussed below, the Commission concludes that, with the tariff modifications directed herein, the Applicants satisfy the Commission's standards for market-based rate authority.

Generation Market Power

9. In the April 14 Order, the Commission adopted two indicative screens for assessing generation market power, the pivotal supplier screen and the wholesale market share screen.⁴ The Applicants have prepared both the pivotal supplier and the wholesale market share screens for the PJM market. According to the Applicants' filing, 7500 MW can be imported into PJM from first-tier markets.⁵ The Applicants state that they pass the pivotal supplier screen and the wholesale market share screen in PJM for each of the four seasons considered.

10. We note that PSEG and Exelon recently announced plans to merge.⁶ Consistent with our practice, we have analyzed the Applicants' generation market power in this proceeding on a stand-alone basis.⁷ The Commission has reviewed the Applicants' generation market power analysis and has determined that the Applicants pass the wholesale market share screen and the pivotal supplier screen in the PJM market. Accordingly, the Commission finds that the Applicants satisfy the Commission's generation market power standard for the grant of market-based rate authority.

Transmission Market Power

11. The Applicants state that other than minor generation interconnection facilities owned by PSEG Lawrenceburg and PSEG Waterford and their affiliates, the only transmission assets PSEG owns are the transmission facilities of Public Service Electric and Gas Company (PSE&G). The Applicants state that PSE&G's transmission facilities

³ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155, at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281, at 61,899 (1996); accord *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,062-63 (1994) (*Heartland*).

⁴ April 14 Order at P 71-72.

⁵ Applicants state that the simultaneous import capability of 7500 MW in PJM was supplied by PJM.

⁶ *Supra* note 2.

⁷ See *Delmarva Power and Light Co.*, 76 FERC ¶ 61,331 at 62,582 (1996), *Consolidated Edison Energy, Inc.*, 83 FERC ¶ 61,236 at 62,033 (1998), and *Central and South West Services, Inc.*, 82 FERC ¶ 61,001 at 61,002 (1998).

are operated by PJM under PJM's open access transmission tariff, which is on file with the Commission.⁸ Further, no intervenors have raised transmission market power concerns. Based on the Applicants' representation, the Commission finds that the Applicants satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

Other Barriers to Entry

12. The Applicants state that neither they nor their respective affiliates control barriers to entry. They submit that neither they nor their affiliates is engaged in the manufacture of electric equipment; has the ability to hinder the siting of generation plants or to block others from siting new plants; or owns or controls unique resources that could impede potential competitors from gaining access to alternative generation suppliers. The Applicants state that they are unaware of any barriers to entry that they would have the ability to erect. In addition, no intervenors have raised barrier to entry concerns. We note, however, that Applicants state in their filing that an affiliate, PSEG Energy Resources & Trade (PSEG ER&T), engages in fuel supply and trading activities as well as offering surplus pipeline capacity to third parties on a competitive basis. One such contract involves the supply of natural gas service to the fuel manager of the Red Oak generation facility located in New Jersey pursuant to a long-term contract. The Applicants also state that their affiliate PSEG ER&T supplies natural gas to fulfill all of another affiliate's (PSE&G) retail gas service obligations.⁹ As a part of that agreement PSEG ER&T assumed the PSE&G entitlements under most of its gas transportation and storage contracts with interstate pipelines. To the extent that any of that pipeline capacity controlled by PSEG ER&T is interstate, we note that, in *Enron Power Marketing, Inc.*, 65 FERC ¶ 61,305 (1993), the Commission determined that a power marketer may be affiliated with an interstate natural gas pipeline because, under the Commission's requirements, such pipelines must offer open access services on a non-discriminatory basis. Also, in *Vantus Energy Corporation*, 73 FERC ¶ 61,099 (1995), the Commission further explained that affiliation with an interstate natural gas pipeline does not raise market power concerns because the pipeline is subject to the Commission's natural gas pipeline open access requirements. Based on the Applicants' representations, the Commission is satisfied that the Applicants cannot erect barriers to entry. However, with respect to any intrastate or local distribution pipelines, should the Applicants or any of their affiliates deny, delay or require unreasonable terms, conditions, or rates for natural gas service to a potential electric competitor in bulk power markets, then that electric

⁸ *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257 (1997).

⁹ Approved by order issued April 16, 2002 by the New Jersey Board of Public Utilities (BPU).

competitor may file a complaint with the Commission that could result in the suspension of one or both of the Applicants' authority to sell power at market-based rates.¹⁰

Affiliate Abuse

13. The Applicants state that they have on file a code of conduct that governs their respective inter-affiliate activities and that the Applicants continue to abide by this code of conduct and the Commission's policies regarding inter-affiliate transactions and communications. They state that, pursuant to the terms of their respective market-based rate tariffs, they will not make any sales of energy to any affiliate utility with a franchised service territory without a separate filing under section 205 of the Federal Power Act.¹¹

14. Commission policy requires merging utilities to treat one another as affiliates pending the consummation of a merger.¹² Accordingly, the Applicants should treat Exelon as an affiliate for purposes of the code of conduct. Further, we note that the Commission's precedent also applies to market-based rate sales of power to affiliates. Therefore, given the announced merger, the prohibition on affiliate sales included in the Applicants' tariffs applies to Exelon and its affiliates.

15. The Commission's review of the Applicants' market-based rate tariffs, however, reveals that the tariffs for PSEG Lawrenceburg and PSEG Waterford do not state that they will not make sales to affiliates "without first receiving" Commission authorization of the transaction under section 205 of the FPA.¹³ Therefore, consistent with Commission precedent, PSEG Lawrenceburg and PSEG Waterford are directed to make a compliance filing within 30 days of the date of issuance of this order to revise their

¹⁰ See, e.g., *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

¹¹ The revised market-based rate tariff sheets containing codes of conduct were accepted in *PSEG Lawrenceburg*, Docket No. ER01-2460-000 (October 5, 2001) (unpublished letter order), and *PSEG Waterford*, Docket No. ER01-2482-000 (September 26, 2001) (unpublished letter order).

¹² *Consolidated Edison Energy, Inc.*, 83 FERC ¶ 61,236 at 62,034 (1998), *Central and South West Services, Inc.*, 82 FERC ¶ 61,101 at 61,103 (1998); *Delmarva Power & Light Company*, 76 FERC ¶ 61,331 at 62,582 (1996) (Noting that "The self-interest of two merger partners converge sufficiently, even before they complete the merger, to compromise the market discipline inherent in arm's-length bargaining that serves as the primary protection against reciprocal dealing.")

¹³ PSEG Lawrenceburg Energy Company LLC, FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 2 and 3; PSEG Waterford Energy LLC, FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 2 and 3.

market-based rate tariffs to include such language.¹⁴ Based on Applicants' representations, recognition of Exelon and its affiliates as affiliates of PSEG Lawrenceburg and PSEG Waterford, and subject to the tariff revisions we direct herein, the Commission finds that the Applicants satisfy the Commission's concerns with regard to affiliate abuse.

Reporting Requirements

16. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.¹⁵ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹⁶

17. The Applicants must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.¹⁷ Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, the Applicants are directed, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to incorporate the following provision:

¹⁴ *Aquila Inc.*, 101 FERC ¶ 61,331 at P 12 (2002).

¹⁵ *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

¹⁶ The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

¹⁷ *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005) (Order No. 652).

[insert market-based rate seller name] must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

18. In light of the pending merger between Exelon and PSEG,¹⁸ the Commission directs the combined Exelon/PSEG entity to file a revised generation market power analysis to reflect the circumstances of the merged company within 30 days of the consummation of the merger.

19 The Applicants are directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter.¹⁹ The Commission also reserves the right to require such an analysis at any intervening time.

The Commission orders:

(A) The Applicants' updated market power analysis is hereby accepted for filing, as discussed in the body of this order.

(B) The Applicants' next updated market power analysis is due the earlier of three years from the date of this order or 30 days after the date of consummation of the merger. The combined Exelon/PSEG entity is directed to file a revised generation market power study to reflect the circumstances of the merged company within 30 days of the consummation of the merger, as discussed in the body of this order.

(C) Applicants' revised tariff sheets incorporating the market behavior rules are hereby accepted for filing, effective December 17, 2003.

¹⁸ *Supra* note 2.

¹⁹ We note that, when the combined Exelon-PSEG entity files the revised generation market power screen following the merger, as directed above, the three-year market update required herein will be based on the date of the Commission's order on the revised generation market power screen for the combined entity.

(D) The Applicants are directed, within 30 days of the date of issuance of this order, to revise the affiliate sales prohibition language in their tariffs, as discussed in the body of this order.

(E) The Applicants are directed, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to incorporate the change in status reporting requirement adopted in Order No. 652, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.